Re Sharma Kumari Shukla; ex p Dato' Abdullah Hishan bin Haji Mohd Hashim (No 2)

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D2-29-3892 OF 1999(2)
KAMALANATHAN RATNAM J
15 MAY 2000

Bankruptcy *— Creditor's petition — Application to set aside — Affidavit verifying petition was affirmed prior to presentation of petition — Whether creditor's petition defective — Whether act of bankruptcy and service of petition fulfilled pursuant to s 6(2) of Bankruptcy Act 1967 — Petitioner not present in court but was represented — Whether creditor's petition should be dismissed pursuant to r 120 of Bankruptcy Rules — Bankruptcy Act 1967 s 6(2) — Bankruptcy Rules 1969 r 120*

On 18 January 2000, the senior assistant registrar ('the SAR') made three orders in respect of encls 29, 37 and 39. Enclosure 29 is the creditor's petition. Enclosure 37 is a notice to oppose the creditor's petition and encl 39 is a summons-in-chambers to set aside the creditor's petition. The learned SAR dismissed encls 37 and 39 and granted the receiving and adjudication orders with costs in respect of encl 29. The judgment debtor appealed against all three decisions. Counsel for the judgment debtor argued: (i) that the court should require proof of the debt, the act of bankruptcy and the service of the petition pursuant to s 6(2) of the Bankruptcy Act 1967 ('the Act'); and (ii) that the creditor's petition should be dismissed since the petitioner was not present in court pursuant to r 120 of the Bankruptcy Rules 1969. The court also considered whether the creditor's petition in this case was defective as the affidavit verifying the petition was affirmed prior to the presentation of the petition.

Held, dismissing the appeals:

(1) The judgment which forms the basis of the bankruptcy proceeding is the proof of the debt. The act of bankruptcy was committed on 27 December 1999 when the court dismissed the affidavit to set aside the bankruptcy notice. The service of the petition was sufficiently proven by referring to the affidavit of service (encl 36). As such, there was sufficient proof to satisfy the requirement of s 6(2) of the Act (see p 394B–C). Rule 120 refers to instances where the petition is dismissed due to non-appearance of the creditors. In the present case, the petitioner was represented by his counsel (see p 396B).

(2) The rules clearly envisage the coming into being of the petition as soon as it is ready for attestation as required by r 102. It is this act of attestation which completes the petition and makes a creditor's petition ready for presentation. The affirmation of this affidavit shortly before the petition was filed but after it had been duly attested is permissible, and well within the scope of the Act and the Rules. It is also practical, convenient and saves expense

because all the required documents can be filed simultaneously (see p 395E–H); *Re Mohd Sharif bin Sapie; ex p Malayan Banking Bhd* [1992] 2 MLJ 102 followed.

[Bahasa Malaysia summary

Pada 18 Januari 2000, penolong kanan pendaftar ('PKP') telah membuat tiga perintah berkenaan dengan lampiran 29, 37 dan 39. Lampiran 29 adalah petisyen pemiutang. Lampiran 37 merupakan suatu notis untuk menentang petisyen pemiutang dan lampiran 39 adalah satu saman-dalam-kamar untuk mengetepikan petisyen pemiutang. PKP yang arif telah menolak lampiran-lampiran 37 dan 39 dan membenarkan perintah-perintah penerimaan dan penghakiman dengan kos berkenaan lampiran 29. Penghutang penghakiman merayu terhadap ketiga-tiga keputusan. Peguam penghutang berhujah bahawa: (i) mahkamah seharusnya menghendaki bukti tentang hutang, perbuatan kebankrapan dan penyampaian petisyen menurut s 6(2) Akta Kebankrapan 1967 ('Akta tersebut'); dan (ii) petisyen pemiutang seharusnya ditolak memandangkan pempetisyen tidak hadir di mahkamah menurut k 120 Kaedah-Kaedah Kebankrapan 1969. Mahkamah juga mempertimbangkan sama ada petisyen pemiutang dalam kes ini adalah kurang sempurna kerana afidavit yang mengesahkan petisyen telah diikrarkan sebelum pengemukaan petisyen tersebut.

Diputuskan, menolak rayuan-rayuan tersebut:

(1) Penghakiman yang membentuk dasar prosiding kebankrapan adalah bukti hutang tersebut. Perbuatan kebankrapan telah dilakukan pada 27 Disember 1999 apabila mahkamah menolak afidavit untuk mengetepikan notis kebankrapan tersebut. Penyampaian petisyen tersebut telah dibuktikan secukupnya dengan merujuk kepada afidavit penyampaian (lampiran 36). Oleh yang demikian, terdapat bukti yang mencukupi untuk memuaskan keperluan s 6(2) Akta tersebut (lihat ms 394B–C). Kaedah 120 merujuk kepada misalan di mana petisyen ditolak akibat ketidakhadiran si pemiutang. Dalam kes ini, pempetisyen telah diwakili oleh peguamnya (lihat ms 396B).

(2) Kaedah-kaedah tersebut jelas menjangkakan kewujudan petisyen sebaik sahaja ia sedia untuk akuan seperti yang dikehendaki oleh k 102. Tindakan akuan inilah yang menyempurnakan petisyen dan menyebabkan petisyen pemiutang sedia untuk pengemukaan. Pengesahan afidavit ini sejurus sebelum petisyen tersebut difailkan tetapi setelah diakui dengan sewajarnya boleh diizinkan, dan memang dalam lingkungan Akta dan kaedah-kaedah tersebut. Adalah juga praktikal, mudah dan menjimatkan perbelanjaan kerana semua dokumen yang diperlukan boleh difailkan serentak (lihat ms 395E–H); *Re Mohd*

A *Sharif bin Sapie; ex p Malayan Banking Bhd* [1992] 2 MLJ 102 diikut.]

Notes

B For cases on creditor's petition generally, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1626–1635.

Cases referred to

Ho Weng Keong, Re; ex p Market-link [1993] 1 MLJ 460 (refd)
C *Lee Boon Hooi, Re* [1992] 1 AMR 214 (refd)
Mohd Sharif bin Sapie, Re; ex p Malayan Banking Bhd [1992] 2 MLJ 102 (refd)
Sharif Haji Sabari, Re [1992] 2 MLJ 102 (folld)
Sobri bin Arshad v Associated Tractors Sdn Bhd [1991] 3 MLJ 32
D (refd)

Legislation referred to

Bankruptcy Act 1967 ss 3(1)(a), (b), (c), (d), (e), (f), (g), (h), (i), (j), 6(2), 93(4), 131
E

Roshan Kumar (*Ng Yook Woon, Andrew TC Saw & Co*) for the appellant/judgment debtor.

Manoharan (*Karpal Singh & Co*) for the respondent/judgment creditor.

Cur Adv Vult

F

Kamalanathan Ratnam J:

Facts

On 18 January 2000, the senior assistant registrar ('SAR') of the
G Bankruptcy Division made three orders. They were in respect of encls 29, 37 and 39. Enclosure 29 is the creditor's petition. Enclosure 37 is a notice to oppose the creditor's petition and encl 39 is a summons in chambers to set aside the creditor's petition. Having heard all three enclosures the learned SAR dismissed encls 37 and 39 with costs and granted the receiving and adjudication orders with costs in respect of encl 29. The judgment
H debtor appealed against all three decisions.

Findings of the court

I shall take all three encls together. En Roshan for the judgment debtor referred me to s 6(2) of the Bankruptcy Act 1967 ('the Act') and argued that
I the court should require proof of the debt, the act of bankruptcy and the service of the petition, at the hearing date. Section 6(2) of the Act reads as follows:

> At the hearing the court shall require proof of — A
>
> (a) the debt of the petitioning creditor; and
>
> (b) the act of bankruptcy or, if more than one act of bankruptcy is alleged in the petition, someone of the alleged acts of bankruptcy; and
>
> (c) if the debtor does not appear, the service of the petition,
>
> and if satisfied with the proof may make a receiving order in pursuance of the petition. B

This argument is in my view unacceptable. It is clear that the judgment which forms the basis of this bankruptcy proceeding is the proof of the debt. The act of bankruptcy was committed on 27 December 1999 when the court dismissed the affidavit to set aside the bankruptcy notice. The service of the petition is sufficiently proven by referring to the affidavit of service (encl 36). As such, there is sufficient proof to satisfy the requirement of s 6(2) of the Act. C

Section 3(1)(a) to (j) of the Act shows 10 ways by which a debtor commits an act of bankruptcy. The case before me falls under s 3(1)(i) where the judgment creditor has obtained a final judgment or order. D

The next ground relied on by En Roshan was based on the *Law and Practice on Bankruptcy* by Williams & Muir Hunter where the learned authors said at p 56 that:

> The affidavit of verification on which the petition is filed cannot be used upon the hearing of the bankruptcy petition. E

Counsel was of no help during the submission. He merely tendered a bundle of authorities and made no reference to any authority to argue his case. However, the court had to read the authorities. One of the cases put in the bundle was *Re Sharif Haji Sabari* [1992] 2 MLJ 102 where the High Court followed the decision of another High Court in *Sobri bin Arshad v Associated Tractors Sdn Bhd* [1991] 3 MLJ 32 which dismissed the petition on the ground that the affidavit was affirmed before the petition was presented, it being asserted that an affidavit cannot support an unborn petition and that a petition comes to life only when presented. Drawing a parallel I gather that counsel must have intended that the creditor's petition in this case is defective because the affidavit verifying the petition was affirmed prior to the presentation of the petition. F G

To my mind, the law on this issue is now almost settled. In *Re Mohd Sharif bin Sapie; ex p Malayan Banking Bhd* [1992] 2 MLJ 102, another High Court refused to follow the decision in *Sobri bin Arshad*. The court held that the petition was not invalid simply because the verifying affidavit was affirmed before the petition was presented. At worst the court held that there was nothing more than a formal defect or an irregularity and that accordingly, ss 131 and 93(4) of the Act could be invoked to cure any defects. H

Section 93(4) reads as follows: I

> Where by this Act or by general rules the time for doing any act or thing is limited, the court may extend the time, either before or after the expiration thereof, upon such terms, if any, as the court seems fit.

A Section 131 reads as follows:

> Formal defect not to invalidate proceedings
>
> No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the
B defect or irregularity and that the injustice cannot be remedied by any order of that court.

It is interesting to note that just like the facts of the case in *Re Mohd Sharif* in respect of the case before me, the affidavit verifying was affirmed on the same day that the petition was signed. Again in *Re Ho Weng Keong; ex p Market-link* [1993] 1 MLJ 460, Lamin J (as his Lordship then was) also
C declined to follow the decision in *Sobri bin Arshad*. His Lordship held that nowhere in the Act or in the Rules is it stated that the affidavit verifying the creditor's petition must be affirmed after the filing or presentation of the creditor's petition. He further held that if the rules demand that the affidavit should be affirmed and filed only after the presentation of the creditor's
D petition, then it ought to have said so in the rules. The views held by Mahadev Shankar J (as he then was) in *Re Lee Boon Hooi* [1992] 1 AMR 214 at p 218 is to be noted. His Lordship said:

> *Sobri bin Arshad* [1991] 3 MLJ 32 dealt specifically with a bankruptcy petition. The crux of this judgment is that since a bankruptcy petition has no
E legal existence until it is presented it can only be affirmed thereafter. I do not agree.
>
> With the greatest respect I would draw the kind attention of all concerned to rr 101 and 102 of the Bankruptcy Rules. Remembering that the court file would already have been opened when the request for the bankruptcy notice was made, these rules clearly envisage the coming into being of the petition as
F soon as it is ready for attestation as required by r 102. In the context of this rule that means it must be witnessed. This is usually done by the petitioning creditors' solicitor. It is this act of attestation which completes the petition and makes it a creditor's petition ready for presentation under the Act after it has been duly affirmed.
>
> The sequence of events provided by the rules makes it imperative for the
G affidavit verifying the petition to be affirmed after the petition has been attested, and not as in a winding-up only after it has been presented.
>
> I am firmly of the view that the affirmation of this affidavit shortly before the petition is filed but after it has been duly attested is permissible, and well within the scope of the Act and the Rules. It is also practical, convenient and saves expense because all the required documents can be filed simultaneously
H and thereafter taken at one go by the registry.

It seems to be the trend now to accept and to follow the decision in *Re Mohd Sharif*. I too am inclined to follow this decision. In fact I see the reasoning of Mahadev Shankar J as sound. The attestation of the petition is what validates it and as in this case too, both the attestation of the petition and
I the affirmation of the affidavit have been done on the same day. In fact this was the identical situation in *Re Mohd Sharif* and there the court held that at worst it was irregular which could be cured.

Finally counsel for the debtor argued that the creditor's petition should be dismissed since the petitioner was not present in court. He relied on r 120 of the Bankruptcy Rules 1969 which provides that if any creditor neglects to appear on his petition, no subsequent petition against the same debtor or debtors or any of them either alone or jointly with any other person shall be presented by the same creditors in respect of the same act of bankruptcy without the leave of the court. Again I do not see the force in this argument. Rule 120 refers to instances where the petition is dismissed due to non-appearance of the creditors. In the present case, the petitioner was represented by his counsel. Accordingly, it is my judgment that r 120 does not assist the judgment debtor in this case.

I therefore dismissed the appeals against all three enclosures with costs.

Appeals dismissed.

Reported by Benjamin Yong